United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

No. 75-4046

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *Petitioner,* v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents,* MCI TELECOMMUNICATIONS CORPORATION and MICROWAVE COMMUNICATIONS, INC., et al., *Intervenors.*	)	No. 75–4046

ON PETITION TO REVIEW AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENORS MCI TELECOMMUNICATIONS CORPORATION AND MICROWAVE COMMUNICATIONS, INC.

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PRELIMINARY STATEMENT

Pursuant to the Court's desire--expressed to the parties at oral argument of motions on April 1, 1975 and again in its Preargument Conference Order of April 21, 1975--to avoid duplication in briefs, Intervenors MCI Telecommunications Corporation and Microwave Communications, Inc. (hereinafter referred to collectively as MCI) have endeavored to keep the instant brief as short as possible. In doing so, they have of

of necessity refrained from responding in detail to certain arguments raised by AT&T, USITA, and the General Telephone Company of California which go far beyond the proper confines of this appeal. In view of the strict limitations placed upon the intervenors to this appeal, both in terms of the scope of their briefs and the time permitted for preparation of their briefs, it is MCI's understanding that the Court will limit its decision to the specific, quite narrow controversy that has been placed before it.

COUNTERSTATEMENT OF THE CASE

MCI adopts the Counterstatement contained in the brief of the Federal Communications Commission as far as it goes. However, in order to make the picture complete, the following should be added.

The Commission's Decision and Order of November 22, 1972, after concluding that 8.5% would be the fair rate of return for AT&T, found that the achievement of that "appropriate" rate of return would require "upward rate adjustments which will produce $145 million." AT&T (Docket No. 19129), 38 FCC2d 213, 250-251. It went on to say that it would therefore "allow AT&T to submit proposed rate changes designed to produce $145 million in additional net income" 38 FCC2d at 251. It also said, in denying a petition by MCI for reconsideration of an interim ruling in the proceeding, that AT&T would be permitted to submit a rate proposal which

would enable it to increase its earnings to the level therein authorized, but that AT&T would be expected to support its proposal, MCI and other parties to the proceeding would then have an opportunity to submit written comments on the rate proposal, and the Commission would review the proposed rate schedules. 38 FCC2d at 246.

On December 1, 1972, AT&T filed its proposed rate schedule. This was preceded and followed by a welter of pleadings. On December 8, 1972 the Commission issued an order calling for comments on AT&T's proposal. MCI sought a stay of that order, but its request was denied. AT&T (Docket No. 19129), 38 FCC2d 981. MCI and five other parties filed comments in opposition to AT&T's rate proposal, and three filings supported the proposal. AT&T replied to the adverse comments.

On January 12, 1973 the Commission released an order which gave AT&T "permission to file" its proposed rate schedules. AT&T (Docket No. 19129), 38 FCC2d 984. This order first recited the procedural developments following its November 22, 1972 decision, which the Commission pointed out had "allowed AT&T to raise its rates $145 million in order to achieve an overall rate of return of 8.5%." 38 FCC2d at 984. (It stated five times that it had "authorized" the Bell System to increase its net earnings by $145 million.) The order then went on to describe AT&T's proposed rate schedule, spelling out the detailed changes made in the MTS

(Message Telecommunications Service, which is ordinary long distance service) and WATS (Wide Area Telephone Service) rates and to note the main objections to the proposal. It then said:

> The essential and single issue before us at this time is whether AT&T has made a sufficient showing that its proposed rate schedules have been reasonably designed to afford it the revenue relief in the amount we determined in Phase I of this proceeding to be required. (Emphasis added--38 FCC2d at 985.)

It concluded by holding that AT&T had given sufficient support for its proposed rate schedule "to warrant our allowing it to be filed as an interim rate schedule." It therefore ordered "That AT&T is hereby given permission to file its proposed MTS rate schedule on not less than 10 days' notice and its proposed WATS rate schedule on 60 days' notice." 38 FCC2d at 987.

INTEREST OF MCI

MCI provides specialized business and data communications services to meet the customized needs of business and governmental organization among major cities throughout the country.

MCI is a new carrier whose very existence is being constantly challenged by AT&T in numerous forums. AT&T has employed many anticompetitive tactics, some of which find expression in tariff filings, in an effort to destroy MCI and other competitors. AT&T's anticompetitive campaign has resulted in an antitrust action by the U. S. Department of

Justice, United States v. AT&T et al., U.S.D.C. for the District of Columbia, Civil Action No. 74-1698, as well as MCI's own private antitrust action, MCI Communications Corporation et al. v. AT&T et al., U.S.D.C. for the Northern District of Illinois, Eastern Division, Cause No. 74C633.

Antitrust relief may, of course, take a substantial period of time and MCI must look to the Communications Act as a restraint upon AT&T's misuse of its vast economic power to undermine competition through anticompetitive tariff filings. AT&T recently tried to undercut the Commission's cease and desist order addressed to its refusal to provide nondiscriminatory interconnections to MCI in Bell System Tariff Offerings of Local Distribution Facilities, 46 FCC2d 413 (1974) aff'd sub nom. Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir. 1974) pet. for cert. filed, (No. 74-1229) by filing tariffs inconsistent with that Commission order. MCI sought rejection of those tariffs. However, in that case, the need for rejection became mooted, at least for the time being, by a Settlement Agreement for an interim period which was accepted by the Commission in a Memorandum Opinion and Order released May 7, 1975, AT&T et al. (Docket No. 20099), ___ FCC2d ___, FCC 75-450.

The instant appeal involves an attack by AT&T on the Commission's power to reject tariffs. Unless the Commission has such power, AT&T will be free to overturn any Commission order that does not suit its pleasure by the simple expedient

of filing a new tariff inconsistent with the Commission's order. A decision invalidating the Commission's power to reject improper tariffs would be tantamount to eliminating effective regulation of common carrier tariffs altogether. The Commission could, of course, still go through the motions of issuing ninety-day suspension orders and holding hearings on rates, but this would be essentially meaningless since any orders it might eventually issue could be effectively overridden by the prompt filing of a new tariff. If the Commission persisted in issuing suspensions and in designating hearings, AT&T could file a new tariff every ninety days, or every day for that matter, if necessary, until the Commission gave up and accepted its impotence in the face of the carrier's intransigence. Such a series of chaotic events--which was clearly not intended by the Congress in adopting the Communications Act--would be made possible by a decision accepting the broader arguments advanced here by AT&T to the effect that the Commission simply has no power at all to reject its tariff filings, regardless of their non-compliance with previous decisions of the Commission.

Thus, although MCI is itself a common carrier and files tariffs of its own that are subject to the rejection power of the Commission,[1/] it has an overriding interest in

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1/ Indeed, the Commission, by order adopted March 3, 1975 by the Chief of its Common Carrier Bureau, rejected tariff changes filed by MCI on January 6, 1975, MCI Telecommunications Corporation, No. 47264.

preserving a regulatory scheme that is workable and provides tariff regulation that is meaningful rather than illusory. The radical interpretation of the regulatory philosophy embodied in the Communications Act propounded herein by AT&T is entirely inconsistent with the fundamental intention of Congress to create a workable regulatory framework that can provide the public adequate protection against the misuse of monopoly power.

ARGUMENT

I. The Issue Of What The Commission Did In Its Decision In Phase I Of Docket No. 19129 Is Not Properly Before This Court.

In its March 26, 1975 "Response of American Telephone and Telegraph Company in Opposition to Motion to Transfer", AT&T declared (at p. 9) that:

> The record before the Commission in its prior Docket 19129 proceeding has no bearing upon the issue of statutory construction before this Court in review of the Commission's rejection Order of March 4, 1975. All of the operative facts necessary to decide the question of the Commission's power to reject AT&T's 1975 tariff filing are to be found in the Order of March 4, 1975 in Docket 20376.
>
> AT&T is not here attacking the Docket 19129 decision.
> * * * (emphasis added.)

Despite these representations, and similar statements made during oral argument of the FCC's Motion to Transfer of March 20, 1975, AT&T persists, in its initial brief on this appeal, in attempting to prop up its case by mischaracterizing the Commission's Decision and Order of November 22, 1972 in

Docket No. 19129, 38 FCC2d 213, in which the Commission prescribed a rate of return for AT&T. USITA and General Telephone are, if anything, even less circumspect in attempting to argue their own interpretation of the Docket No. 19129 Decision and Order.

The nature of the Docket No. 19129 Decision and Order is a matter currently at issue before the United States Court of Appeals for the District of Columbia in the consolidated cases of Ralph Nader and Reuben B. Robertson III v. FCC (No. 73-1045) and Microwave Communications, Inc. and MCI Telecommunications Corporation v. FCC (No. 73-2051).

AT&T has intervened in that proceeding and has filed an extensive brief in which it has maintained that the Docket No. 19129 Decision and Order is binding upon the rate-paying public. In the instant appeal, AT&T is arguing, in effect, that the Docket No. 19129 Decision and Order is not binding upon AT&T itself and is contending that AT&T is free to make a tariff filing inconsistent with the terms of that decision anytime it chooses. It is thus scarcely surprising that AT&T should be so intent upon avoiding a transfer of its instant appeal to the D. C. Circuit and consolidation there with the Docket No. 19129 appeal.

In its order of April 15, 1975, this Court denied the FCC Motion to Transfer "without prejudice to renewal upon argument of the petition for review. . . ." The Court took that action prior to receipt of AT&T's brief on the merits

and in light of AT&T's representations that it was its intention not to attack the Docket No. 19129 decision nor to rely upon the Docket No. 19129 record. MCI submits that AT&T's brief is inconsistent with its earlier representations to the Court and proposes that the Court transfer this appeal to the D. C. Circuit.

For example, AT&T erroneously contends at page 40 of its brief that, in its Docket No. 19129 decision, the Commission did not purport to prescribe a rate of return. At page 39 of its brief, AT&T erroneously contends that the Docket No. 19129 decision represented merely a "rate of return finding for a past period." Again, at page 10 of its brief, USITA alleges that the Commission "did not, in fact prescribe an 8.5% rate of return or any other rate of return, either in 1972 or at any other time." Similarly, at page 1 of its brief, General Telephone states that it supports the arguments made by AT&T and agrees that "there can be no doubt that the 1972 order of the Federal Communications Commission in Docket No. 19129, did not constitute a 'prescription' of a rate of return within the meaning of §205(a) of the Communications Act."

MCI believes that all of the foregoing statements are incorrect and misstate the true facts. MCI submits that a study of the Docket No. 19129 record presently before the D. C. Circuit will support this conclusion. MCI has already argued to the D. C. Circuit that the Commission's order did,

indeed, constitute a prescription. Docket No. 19129 was instituted pursuant to Section 205 of the Communications Act as well as Section 204. AT&T (Docket No. 19129) 27 FCC2d 149, 150 (1971). The Commission specifically designated as an issue the question of "what charges should be prescribed." AT&T (Docket No. 19129) 27 FCC2d 151, 162 (1971). The Commission's Administrative Law Judge explicitly characterized the ordering clause of his initial decision in the proceeding as a "prescription of fair overall rate of return for the Bell System" (emphasis supplied), AT&T (Docket No. 19129) 41 FCC2d 389, 448. In Docket No. 19129, the FCC obviously did not intend its two-year-long proceeding to be futile exercise to fix a rate of return that could be changed unilaterally by the carrier by filing new and inconsistent rates the very next day. A study of the record makes this manifest. AT&T, however, would have this Court adopt a contrary conclusion without having that record before it. We trust that this Court will not allow itself to be so used.

In addressing AT&T's November 1970 rate filing, the Commission initially divided its consideration of the issues posed thereby into three parts. Phase I of Docket No. 19129, at the emphatic request of AT&T, was to be limited exclusively to the question of rate of return and treated on an expedited basis. Phase II was to be devoted to such questions as the reasonableness of AT&T's expenses and rate base and AT&T's relationships with Western Electric. Thirdly, the issue of

cross-subsidization of AT&T's competitive services out of revenues from its monopoly services which the Commission said was raised by AT&T's tariff filing was to be considered in the already pending proceedings in Docket No. 18128. The Commission directed that those proceedings should also be expedited so that the determination in Docket No. 18128 "should be available in a timely fashion to implement the conclusions reached" in Docket No. 19129. AT&T (Docket No. 19129) 27 FCC2d 149, 154-156. Docket No. 18128 has not yet been completed--nor has Phase II of Docket No. 19129. If the rate of return determination in Phase I of Docket No. 19129 has no present effect, as AT&T asserts in its brief herein, then the results in Docket No. 18128 cannot be used "to implement the conclusions" reached in Phase I of Docket No. 19129 as provided in the Commission's original designation order. If the Commission's order is to be construed so that rational results will flow from it, the rate of return determination in Phase I of Docket No. 19129 was clearly meant to prevent further rate increases during the period necessary to complete the other facets of the Commission's proceedings on AT&T's 1970 rate filing--that is Docket No. 18128 and Phase II of Docket No. 19129[2/]--unless AT&T were to seek the Commission's permission to file rates which would increase its rate of return

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2/ A subsequent modification of the procedures was made on April 5, 1974 when the Commission removed issues relating to AT&T's Wide Area Telephone Service from Phase II of Docket No. 19129 and placed them in a further new proceeding--Docket No. 19989. AT&T, 45 FCC2d 81.

and were to persuade the Commission that such a step was necessary in the public interest without a hearing to test its claims. AT&T did not even try to pursue that course and the data it submitted in support of its tariff filing--or matter of which the Commission could take official notice--persuaded the agency that it could allow a departure from the rate of return it had prescribed at the end of Phase I of Docket No. 19129 to accommodate increased costs of debt capital. However, AT&T's claims as to increases in its cost of equity capital were not similarly persuasive. The Commission concluded that it would have to hold a hearing--which it undertook to expedite--before it could authorize a departure from its prior prescription to allow for such asserted increases in equity costs. The agency could not discharge its obligation to the public in any other way. As AT&T repeatedly argues, Congress undertook to balance the interests of communications carriers and the public. But Section 205 of the Communications Act is a part of that balance--a fact which AT&T tries to ignore by advancing an argument which virtually reads Section 205 out of the law. See below for further discussion of this point. The Commission's rate of return determination in Phase I of Docket No. 19129 could scarcely have been merely retrospective, as now asserted by AT&T, if the trifurcated procedures established at the outset by the Commission were to be meaningful.

Since it was at AT&T's own behest that the Commission

adopted the procedural arrangements whereby the expedited rate of return determination was made in advance of the more complex determinations required in addressing AT&T's tariff filing, it is hardly fair that AT&T seeks now to escape the consequences of this determination because its costs of securing new capital have increased prior to completion of the remainder of the proceedings. If the costs of securing capital had decreased during that period, would AT&T have permitted other parties to re-open Phase I before completing the rest of the proceedings? We think not. Clearly, it was the Commission's intention in Docket No. 19129 that its Phase I rate of return determination was to be binding upon all parties at the very least until all facets of the proceedings on the AT&T rate filing had been completed.

There is a three-sided argument going on here, which is divided between this Court and the Court of Appeals for the District of Columbia. The FCC believes that the Docket No. 19129 decision was a lawful prescription. MCI believes that the Docket No. 19129 decision was a prescription, but that it was an unlawful one because of defective procedures which the FCC had adopted at AT&T's urging. AT&T contends that the Docket No. 19129 decision was lawful in fixing a higher rate of return for its benefit and in authorizing the filing of specific charges to effectuate that determination, but asserts that it was not a prescription binding upon itself in any way which would interfere with its claim that

it can file new rates under Sections 203 and 204 of the Communications Act any time it chooses--even though they are inconsistent with the Commission's orders made two years ago after a full hearing.

MCI will not attempt to reargue its D. C. Circuit appeal here. That would not be proper--especially in view of this Court's concern that briefs be kept to a minimum. If this Court should decide not to transfer this appeal to the D. C. Circuit, in accordance with MCI's renewed proposal that it do so, the only appropriate step to take concerning the disputed characterizations of the Docket No. 19129 decision would be to accept the FCC's interpretation as the basis for proceeding on a contingent basis until the D. C. Circuit reaches its decision on the issue. Such contingent consideration of the matter would, we believe, be a poor alternative to transfer and consolidation with the Docket No. 19129 appeal in the D. C. Circuit (Nader et al. v. FCC, Nos. 73-1045, 73-2051) since each of the two courts would be deprived of information and argument available to the other.

II. The Commission Has The Authority To Reject Tariff Filings Inconsistent With Its Previous Prescriptions.

If it is accepted, on the basis suggested above, that the Commission did in fact prescribe a rate of return in its Docket No. 19129 Phase I decision, there can be no doubt that it was proper to reject AT&T's tariff filing insofar as

it was inconsistent with that prescription in ways which the Commission did not feel it could approve informally and without a hearing. Section 205 specifically provides that, after the Commission has made a prescription, the carrier shall "not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." See Permian Basin Area Rate Cases, 390 U.S. 747 (1968); FPC v. Tennessee Gas Transmission Company, 371 U.S. 145 (1962); United States v. Conrick, 298 U.S. 435 (1936).

AT&T's argument that Section 205 does not permit prescriptions of rates of return is totally without merit. By its terms, Section 205 extends to the prescription of any "practice" in a tariff as well as to specific "charges", "classifications" and "regulations". In AT&T v. FCC, 449 F.2d 439 (2d Cir. 1971), this Court held that the Commission had, indeed, made a prescription in its Telpak Sharing decision, 23 FCC2d 606 (1970), reconsideration denied 26 FCC2d 862 (1970) when it directed AT&T to extend "sharing" privileges to gain the benefits of volume discounts to all users. The Court held that: "Telpak and Telpak Sharing are clearly rate practices." (emphasis added). 449 F.2d 439, 454. Like a rate of return, Telpak Sharing is a concept that forms an ingredient in the calculation of a specific charge for a

specific service. Like a rate of return, it is not a "charge" itself. However, this Court held that it had been "prescribed" by the Commission--although the Commission had not used that term, as AT&T contends it must (Brief, p. 29, n. 39). (In that case, the Court also found that it had been prescribed unlawfully in view of the inadequacy of the hearing that had been afforded, which is precisely MCI's position in the D. C. Circuit case as to what the Commission did in implementing its rate of return prescription in Docket No. 19129, Phase I.)

AT&T's reliance upon this Court's decision in AT&T v. FCC, 487 F.2d 864 (1973) is misplaced. In that decision the Court explicitly recognized that the Commission may, in circumstances other than those presented there, reject a tariff, e.g., one that conflicts with a statute, 487 F.2d at 880, fn. 33. In AT&T v. FCC, 503 F.2d 612, 617 (1974) this Court observed of its earlier decision in the "special permission" case that:

> The "special permission" procedure there improvised by the FCC was in no fashion authorized by the Communications Act and did not constitute a device which disrupted the statutory scheme of carrier initiated rate changes. It was in effect a rate "prescription" and inconsistent with 47 U.S.C. §205, which authorizes rate prescriptions only after a full hearing and specific findings.

Thus, the Court found that a prescription had been made by the Commission, but without hearing of any kind and therefore illegally. In the instant case, however, AT&T has represented to the Court that it "is not here attacking the Docket No. 19129 decision" "Response of American Telephone

Company in Opposition to Motion to Transfer" of March 26, 1975, p. 9. The question of the lawfulness of the Docket No. 19129 decision is properly before the D. C. Circuit in Nader et al. v. FCC, supra, and not before this Court. MCI has no objection to AT&T's arguing against the lawfulness of the prescription in Docket No. 19129, but insists that it must do so in the court that has jurisdiction over the decision involved, so that that court can evaluate AT&T's arguments previously made there to the effect that the Docket No. 19129 decision is binding upon other parties in light of its new assertion that the decision was not binding upon AT&T itself when it becomes inconvenient.

III. The Commission Exercised Its Authority Properly In The Present Case.

AT&T's argument here proves too much and would make the 90 day suspension provision of §204 the only really operative portion of the Act. It tried to do this with respect to the Commission's adoption of a rule increasing the required notice period from 30 to 60 days and was rejected [AT&T v. FCC, 503 F.2d 612 (2d Cir. 1974)]--though it had prevailed on the prior permission requirement.

In arguing that it must be free to file tariff changes to adapt to its own assessment of changes in economic conditions, AT&T must be arguing that even if the FCC clearly prescribed charges or practices under §205, it could not bar

AT&T from filing higher rates or inconsistent practices and invoking the "statutory scheme" of §204. But that can't be right because §205 clearly says that once the Commission has gone through a hearing and prescribed charges or practices, the carrier cannot file and implement other charges or practices--unless the Commission has granted it permission to do so.

When a regulatory commission prescribes charges it also prescribes a rate of return--and vice versa. That is, if the FCC had determined on November 22, 1972 that Bell should be allowed to earn 8.5% and had then specifically prescribed the rates Bell tendered to achieve that result at projected future volumes of traffic, it would have prescribed the rate of return also. A given rate of return and the rates which will yield it are simply two sides of the same coin. The Commission can prescribe certain rates with the knowledge that they will yield an 8.5% return, or it can prescribe an 8.5% rate of return with the knowledge that the carrier, having devised and submitted rates that will yield that return on anticipated volumes of business, is so circumscribed by the rate of return prescription that its proposed rate schedule has really been prescribed. In other words, fixing a rate of return determines rates and fixing rates determines rate of return.

In fact, if all the Commission did in November, 1972 was to prescribe rate of return in the abstract, then no

benefit could flow to Bell because it can't "collect" a rate of return as such. All it can do is to collect the rates which have been "prescribed" by the Commission's rate of return prescription--implemented by Bell's filing of a schedule of rates which it said would achieve the prescribed rate of return and which the Commission approved and accepted. If Bell is now insisting that, in order to make its prescription binding, the Commission should have formally prescribed the rates themselves, then it must concede that it could not have realized any benefit from the prescription of a higher rate of return for months and perhaps years because there would have had to be a further hearing on the propriety of the rate structure itself--a position which MCI continuously urged in Docket No. 19129. Until that had been completed, the decision as to rate of return would have simply been a first step which yielded an abstraction--the judgment that 8.5% was the fair rate of return--which could have no practical consequences until the process was completed.

Once the Commission has made a prescription--whether of rates or in terms of rate of return--§205 makes it clear that the carrier cannot thereafter impose any other charges, or charges which yield a higher rate of return. It may well be, as Bell argues, that changing conditions will later make the prescribed rates or rate of return unreasonable, but that does not relieve the carrier of the binding effect of the §205 prescription--nor does it permit it to proceed under

§204 as if no such prescription had been made, simply filing any tariff changes it pleases and putting them into effect five months later (after 60 days notice and a maximum of three months suspension). That would permit a carrier completely to frustrate the Commission's power to prescribe rates or rate of return, since it could wait a few days or weeks after a prescription and then file tariff changes completely at odds with the Commission's order, claiming that changed circumstances require an adjustment. That would be intolerable because it would really leave the Commission helpless. It would also elevate §204 above all other sections of the Communications Act when, in fact, they must all be read together and applied in such a way that they form a part of a unified system of regulation.

The FCC has not prescribed rates or rate of return very often, so there have not been many occasions when action under §205 curtails the rights a carrier would otherwise have under §204.[3/] But when the Commission has gone through a

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3/ In most cases the Commission has resorted to the process of continuing surveillance, which involves a negotiated agreement between the agency and AT&T as to the amount by which the latter's earnings level is to be adjusted, followed by the carrier's filing rates--wholly unreviewed by the FCC--designed to achieve the agreed result. That process was challenged in Public Utilities Commission v. United States, 356 F.2d 236 (9th Cir.), cert. denied, 385 U.S. 816 (1966), but the Court of Appeals for the Ninth Circuit affirmed the procedure followed. But that was completely different from what was done in Docket No. 19129--there was no formal proceeding, no parties other than AT&T and the Commission were allowed to participate, the Commission did not fix a percentage authorized rate of return but simply issued a public notice that it would accept rates (which it had never seen and did not review) which AT&T represented would reduce its annual revenues by the negotiated amount. Those rates--unlike the ones AT&T filed in January, 1973, were indeed carrier-made rates because they were never studied or approved by the FCC.

formal hearing and prescribed rates or a rate of return for a carrier, that decision is binding--under §205--until the agency rules otherwise. This is not so bad as Bell makes it seem because if conditions do take a serious turn, the Commission will grant permission to adjust rates--whether the carrier is authorized to proceed under §204 or otherwise. In this case, for example, the Commission was persuaded that changes in Bell's cost of debt justify an increase, on an interim basis, in the prescribed rate of return--and in the rates needed to achieve that goal. But the Commission was not persuaded on the question of cost of equity and has continued the prescribed rate of return, as adjusted, pending completion of another hearing. That was an entirely proper procedure.

However, MCI believes it is clear that the Commission, in its orders of November 22, 1972 and January 12, 1973 discussed in our additional Statement of the Case, did the following things:

(1) It fixed AT&T's rate of return for the foreseeable future at 8.5% and authorized it to increase its net revenues by $145 million in order to come up to that earnings level.

(2) It authorized AT&T to submit for Commission review--after comment by interested parties--a proposed rate schedule designed to yield the

$145 million increase in net income.

(3) It reviewed AT&T's rate proposal and the comments filed with respect to it, and then gave AT&T permission to file the proposed rates and to put them into effect.

It will be noted that this did not follow the normal pattern of carrier-made rates which AT&T extols as the pattern decreed by the Congress--and which it claims it was entitled to follow in connection with its rate filing of January 3, 1975, which it concedes (Brief, p. 3) was "designed to improve AT&T's rate of return on interstate operations to a range of 10 1/2 to 11 percent"--a level well above the 8.5% "determined and prescribed" by the Commission in its Docket No. 19129 orders discussed above. A carrier normally files tariff changes whenever it pleases, in whatever form it chooses, and to achieve however much increased revenues it believes necessary--all without any prior consideration or approval by the Commission. If the latter should be unable to find the carrier's desired changes clearly lawful, it can suspend them for ninety days and institute a hearing to consider their propriety. If the hearing is not completed within ninety days, the carrier can put its rate changes into effect.

But here AT&T was not exercising any such freedom of choice. It did not choose the time of filing, but was told to submit for review--not file--<u>proposed</u> tariff changes

within thirty days after release of the Commission's November 22, 1972 decision. It was not free to change rates in any way it desired or to seek whatever increase in revenues it thought necessary. Instead, it was told that the Commission expected it to submit a proposal consistent with sound rate-making principals and one which would change rates for "those services particularly affected by increased costs, such as operator assisted calls"--and it in fact did increase the rates for operator assisted calls. It was also told to propose rates which would yield no more than $145 million--the sum necessary to bring its level of earnings up to the 8.5% rate of return the Commission had prescribed. And it was only after the Commission had reviewed the proposal and given its specific permission that AT&T was allowed actually to file its proposed rate changes. It strains credulity for AT&T to say that all of that was simply in exercise of its rights under its interpretation of the statutory scheme of common carrier regulation, rather than a binding Commission determination of its rate of return--and the specific rates to achieve it.

Throughout its brief AT&T relegates §205 of the Act to a minor--indeed an inconsequential--role, although it is as much a part of the statutory regulatory scheme--and of the careful balance worked out by Congress--as §§203 and 204. Indeed, AT&T argues for fourteen pages in its brief that the Commission's rejection of its tariff contravened the statutory

scheme of carrier-initiated rates without giving any effect to §205 at all.[4/] The reason for this is clear. AT&T hopes to prevail upon this Court--without having the record in Docket No. 19129 before it--to accept its interpretation of the orders therein and to then construe the Act in a way which will, to all intents and purposes, free AT&T of any effective regulation of its rates. It wants to elevate carrier-made rates to such a pinnacle of importance that the FCC--though it can conduct lengthy hearings as to the lawfulness of such rates--can never really constrain or control them. It can always be claimed that conditions have changes during the rate proceedings--which tend to be rather long--and that no matter what the FCC decides, AT&T must be allowed to file, and promptly implement, rates of its own choice and devising which will take account of such "changes". Of course, AT&T alone decides whether the changes have occurred and what their impact has been, and the Commission--even though it had clearly prescribed charges within the meaning of §205--cannot review its determination and reject the filing for clear non-compliance with its prescription. Such an interpretation would turn the Act completely upside down and leave the public without protection against excessive rates.

AT&T also argues at length that the FCC cannot

4/ It does acknowledge the existence of §205 at p. 17 and in n. 24 there, but never discusses how it fits in with §§203 and 204. It also refers to §205, merely in passing, on pp. 18 and 19.

prescribe a rate of return--although, as pointed out above, that is simply the obverse of prescribing charges. It tries to create a mystique about "rate of return" by equating it with its cost of capital and claiming that it "may continuously change, depending on economic and financial conditions." (Brief, p. 31). But as the Commission has used the term, "rate of return" means the level of net income a carrier will be allowed to retain, after paying its legitimate expenses, out of its future operations. It is expressed as a percentage of the carrier's approved rate base and--AT&T to the contrary--once it is prescribed or authorized, it does not change until the Commission changes it.[5/]

AT&T has long encouraged the FCC to regulate by fixing an authorized rate of return, leaving to the carrier the decision as to which charges it should change to comply with the agency's decision. This has led, in recent years, to abuses of which MCI has complained in Docket No. 19129. The problem there was that AT&T persuaded the FCC--which did

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5/ AT&T argues (pp. 36-41) that a rate of return determination is not binding prospectively without regard to changes in economic and financial conditions. It is true that if conditions really change, the FCC should--and in the past, always has--made allowances therefore and adjust any prescribed return it may have fixed. That is all that is involved in the "past administrative practice" AT&T recounts at length. But the Commission, not AT&T, must be the one to determine that changes have occurred which justify a change in the prescribed rate of return. Any prescription of a rate of return operates only in future and should continue in effect until the Commission--on request of a carrier or on its own motion--decides that an adjustment should be made. That is the power Congress has conferred on the Commission in §205--and which AT&T is trying to subvert.

not accept its November, 1970 filing (Brief, p. 38)--to deal with the rate of return question first. When that resulted in a determination that it should be allowed to increase its earnings level to 8.5%, AT&T was pleased to propose charges to achieve that result for the Commission's review and awaited its permission to file and implement those rates on an interim basis. It has been collecting those charges ever since, and so has benefited greatly from the Commission's prescription of the higher rate of return. But now it is no longer satisfied with those benefits. Instead of seeking the Commission's permission to depart from the authorized rate of return, it has boldly asserted a right to ignore it entirely. The Commission has, nonetheless, granted it permission to exceed the prescribed rate of return to the extent AT&T has clearly justified such relief--and has granted an expedited hearing on the issue of cost of equity capital, which AT&T will no doubt seek to convert immediately into further interim rate increases. In all of this, AT&T's needs get priority, and the public must wait for years for final ruling as to the lawfulness of its rates. But that is not enough! AT&T seeks to twist the Communications Act to its own ends, and to destroy the FCC's ability to protect the public effectively in the process. It must not be allowed to succeed. The Court should either dismiss its petition for review or transfer this case to the District of Columbia Circuit Court which has jurisdiction of the basic orders in

Docket No. 19129 which are central to the matter at issue here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William J. Byrnes, hereby certify that copies of the foregoing BRIEF FOR INTERVENORS MCI TELECOMMUNICATIONS CORPORATION AND MICROWAVE COMMUNICATIONS, INC. were served this 21st day of May, 1975, postage prepaid, by United States mail, to the following parties:

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